COMITY IN THE FEDERAL COURTS

COMITY is a term of international law. Its best definition, in the light of the derivation of the word, is "courtesy." Dicey, indeed, looking at what the courts do when they profess to be actuated by comity, rather than at what they say, has defined it as caprice; and it is perhaps true that no more definite principle than caprice can be said, on the whole, to govern the attitude of the courts of one nation towards those of another. What they say, however, as to their attitude, is always couched in terms of the greatest courtesy. Story says that it has been thought by some jurists that the obligation of nations to give effect to foreign laws when not prejudicial to their own interests is not so much a matter of comity or courtesy as of paramount moral duty.[1] But this is a counsel of perfection.

The attitude of the English courts towards the decisions of American courts may be taken as typical of the working of the principle of comity. In a case like *Castro* v. *Regina*[2] we see it given considerable effect. There Lord Watson refers to an American case, "not of course as an authority, because I take it that a judgment of a court in New York is not an authority in a case arising in England, with regard to English rules of procedure, but as a decision of learned judges that ought to influence the House to come to the same conclusion in the present case." "Ought to influence" puts it about as strongly as international comity can be put.

The attitude of American courts towards the decisions of English courts is theoretically precisely that expressed by Lord Watson, but practically the psychological standpoint is slightly different. Here there would be the respect for learned judges, of which Lord Watson speaks, with an added element of respect for judges sitting at the very fountainhead of our system of law. It is comity in each case, and comity is only courtesy; but the courtesy of the parent towards the child is not just the same thing, psychologically, as the courtesy of the child towards the parent. That

[1] CONFLICT OF LAWS, § 33.

[2] 6 App. Cas. 229, 249 (1881).

there are these psychological elements in comity is a consideration not to be overlooked in a study of its workings as a judicial principle.

In American law the word "comity," in addition to its normal use, has been borrowed to express relationships not international. The logical anomalies of a federal union have brought this about. The qualified kind of sovereignty prevailing under a federal government has led to a qualified conception of comity. Our sovereign states, in so far as they are sovereign, possess to that extent sovereign judicial powers. The relation between independent state tribunals, acknowledging no appellate superior within the sphere of their domestic concerns, came naturally enough to be expressed by the word "comity." But it is not quite the comity of international law. It is a comity exercised under the dominance of the "full faith and credit" clause of the Constitution, and under limitations which preclude the final determination of questions of federal constitutional and statute law. The terms in which this kind of comity is expressed in judicial discussion of the subject in our state courts are the same as those used to define comity in international law; but the underlying difference in situation should not be lost sight of.

Furthermore, just as the states have their own field of sovereignty, and their own courts with jurisdiction in that field, so has the federal government a field of sovereignty, and a system of federal courts exercising jurisdiction in that field. These federal courts, aside from the Supreme Court with national jurisdiction, have a local jurisdiction, geographically limited. Each District Court, like the old Circuit Court, now merged in the District Court, has jurisdiction only within its own district, which covers either a whole state or some definite part of a state. Each Circuit Court of Appeals, of which there are nine for the country, has jurisdiction over the groups of states which Congress has assigned as its circuit. Each District Court is independent of every other District Court, each Circuit Court of Appeals of every other Circuit Court of Appeals. Congress has not defined their attitude towards each other. What should that attitude be? It has been left to them to settle it for themselves, and they have said that it should be one of comity. But if comity, it is comity of a new kind,—it is not the comity of international law. It is comity between courts of the same sovereignty, administering the law of that sovereignty. This was not the situation under which the doctrines of comity took shape;

it was not at all a situation for which a principle that Dicey could only define as caprice was adequate. Yet the courts have not always been careful to keep this difference before them, and their use of an international vocabulary in a domestic situation has kept the subject under the influence of international conceptions.

In the United States Supreme Court itself, where is lodged the final check upon divergence of view in the federal courts, the distinction has not been kept clear, for in *Mast, Foos, & Co.* v. *Stover Mfg. Co.*[3] we find Mr. Justice Brown using the following language, *à propos* of a contention that comity should have induced the court below to follow a decision in another circuit:

"Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other coördinate tribunals."

These words are classic in their clarity, and wholly admirable as a definition of comity in the international sense; but it may be permitted to doubt whether they outline a wise policy for the guidance of the inferior federal courts in their mutual relations. Moreover, they are perhaps reduced to the category of a *dictum* when the learned justice adds (p. 489):

"It is scarcely necessary to say, however, that when the case reaches this court, we should not reverse the action of the court below if we

[3] 177 U. S. 485, 488 (1900).

thought it correct upon the merits, though we were of opinion it had not given sufficient weight to the doctrine of comity."

It is to be noted, too, that the cases which Mr. Justice Brown cites in his opinion are all cases which hold for uniformity of decision by different courts in patent litigation. Indeed, in patent causes the necessity for uniformity of decision has been well-nigh universally recognized.

Back in 1874 Judge Emmons, sitting in the Eastern District of Michigan, gave elaborate consideration to this question of consistency in the interpretation of patents, in the fierce litigation over the patent for a rubber plate for false teeth. Speaking of the principle that courts of the same government, having the same jurisdiction to decide the same points, should not be at variance with each other, he said in his opinion:

"If one system of coördinate courts more than another calls for the application of this general principle it is that of the Circuit Courts of the United States. They all have similar special jurisdiction, and are all, in an eminent degree, looked to for all those rules of right and property created under the Federal Statutes, and in reference to the subjects coming within the Federal Constitution. Although divided in jurisdiction geographically, they constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the Appellate Court.

"The comment at the bar upon this subject assumed that the final decrees and elaborately-reasoned decisions of circuit judges, with full citations and criticisms of authorities, often involving the entire history of the law upon the subject discussed, are to be ranked with what are termed *nisi prius* decisions. They are in all respects judgments *in banc*. They not only have the deliberation and care of judgments in the high courts of Chancery in England and this country, but the court of itself bears the same relation to the whole judicial system that such courts do to those in which they exist. There is but one Appellate Court above them. A superior tribunal also reviews the judgments of the English Chancery, and so of nearly all the like state tribunals.

"Although we would by no means confine our acquiescence in the decisions of our brother judges to cases where the particular patent has been adjudged to be valid, or that a particular device infringes upon it, still we think that eminently beyond other cases is the rule applicable to them. The right of the complainant is a special franchise granted by

the political power. A special organism is created for the purpose of ascertaining his right to the grant. When issued, the several federal courts are authorized to review the rectitude of this action, and from their determination an appeal lies to the court of last resort. It is an indivisible system for ascertaining the rightfulness and the limits of the patent, and when, in any coördinate department of it, judgment has been pronounced, that duty should be deemed performed until reversed by an appellate tribunal. It would present an unseemly spectacle for the same governmental grant to receive half a dozen different constructions in as many coördinate courts, all authorized to define it and inform the citizens what it means, and all having the force of law contemporaneously under the same government. . . . Until some special tribunal is instituted for the determination of these questions, and some general mode of reviewing these public grants, which shall test definitely the rightfulness of the grants, it will result in a large saving of money to the great masses of our citizens who are using these improvements, to let them and their advisers of the profession understand that a fair and full examination in one court, followed by a judgment, will, in the other coördinate tribunals, be acquiesced in as law, if there is no appeal and reversal." [4]

Judge Emmons supports his reasoning with citations of instances of conformity among the federal courts, among them one which has the weight of the great name of Mr. Justice Story, where, sitting in the First Circuit, he deferred to a decision of Mr. Justice McLean in the Third Circuit, saying that, "although his mind was not without much difficulty on this point, he should rule for the plaintiffs, in accordance with the opinion of Mr. Justice McLean." [5] Judge Emmons's language makes the question of public policy so clear that it hardly needs to be supplemented, yet it may be well to quote from a few of the later cases in which the language is especially persuasive.

In *Shreve* v. *Cheesman*,[6] Circuit Judge Sanborn had occasion to consider this question of uniformity of decision. He first quotes Chancellor Kent's statement: [7]

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[4] Goodyear Dental Vulcanite Co. *v.* Willis, 1 Flipp. 388, 393 *et seq.* (1874). This language was approved by Circuit Judge Wallace in the Second Circuit in Reed *v.* Atlantic & P. R. Co., 21 Fed. 283 (1884).

[5] Washburn *v.* Gould, 3 Story 122, 133 (1844). Mr. Justice Miller's conception of comity between judges of different rank exercising the same jurisdiction is expressed in Appleton *v.* Smith, 1 Dillon 202 (1870).

[6] 69 Fed. 785, 790 (1895).

[7] 1 KENT, COMM. §§ 475, 476.

"If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."

He then adds:

"It is a principle of general jurisprudence that courts of concurrent or coördinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court."

In an admiralty case,[8] in the Eastern District of Pennsylvania, Judge Butler went counter to his own views because of rulings upon the same point in other districts. Citing these rulings he says:

"In neither of the cases is the subject discussed at any length, or any adequate reason assigned, in my judgment, for the conclusion reached. So great, however, is the importance I attach to uniformity of decision by courts of coördinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle."

Nor is it a valid objection that the parties before the court are not the same. Judge Green in the District of New Jersey puts this strongly:[9]

"The fact that the defendant in the present case was not in any wise personally interested in the former case cannot be regarded as lessening in any degree the binding effect of a solemn decision made in that cause. What was decided was a question of law arising upon these very letters patent. Such decision becomes a precedent, to be followed in all cases in which the same legal question, arising from the same letters patent, presents itself for consideration, and an authority implicitly to govern, unless it clearly appears that the principles which underlie it have been grossly misunderstood or misapplied."

[8] The Chelmsford, 34 Fed. 399, 402 (1888).

[9] Zinsser *v.* Krueger, 45 Fed. 572, 574 (1891).

In *Edison Electric Light Co.* v. *Packard Electric Co.*[10] Mr. Justice Miller is quoted as follows:

"I think that the uniform course of decisions in the courts of the United States, where a previous decision has been had by a circuit court with regard to the validity of a patent, has been to treat it as of the very highest nature, and as almost conclusive in an application for injunction in another case founded on the same patent."

In a patent suit in the Eastern District of Pennsylvania[11] Judge Butler, in following a decision on the same patent in the District of Connecticut, said:

"A proper regard for the interests of suitors requires that the decisions [in Connecticut] shall be given controlling effect. The importance of uniformity in the law, as administered in the several circuits, is too great to be disregarded, even where the judges may differ in opinion. Conflicting decisions on the same patent would be an intolerable evil."

And this was said by Judge Blodgett, in the Northern District of Illinois,[12] to be "the true policy of the United States courts in reference to patent cases."

Likewise Judge Taft, sitting in the Southern District of Ohio,[13] says:

"It is well settled that a decision of one circuit court, after a full hearing, in a patent case, upon substantially the same evidence, will be followed in another circuit court, and that, if a different conclusion is to be secured, the case must be carried to an appellate court."

Circuit Judge Dallas has put the matter upon higher ground than that of comity:[14]

"If the rule here adverted to were one of 'comity' merely, it would, I think, be impossible to justify its derogation from the right of suitors to the veritable judgment of the tribunal to which any particular case is confided for decision. Upon general questions of law, the views of courts of coördinate jurisdiction are always regarded with respectful consideration, but never as controlling. In patent causes, however, conclusive effect is accorded by each of the circuit courts of the United

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[10] 61 Fed. 1002 (1893).

[11] Enterprise Mfg. Co. *v.* Deisler, 46 Fed. 854, 855 (1891).

[12] Kidd *v.* Ransom, 35 Fed. 588 (1888).

[13] Allington & Curtis Mfg. Co. *v.* Globe Co., 89 Fed. 865, 866 (1898).

[14] Office Specialty Mfg. Co. *v.* Winternight & Cornyn Mfg. Co., 67 Fed. 928 (1895).

States to a prior judgment of any other of them, wherever the patent, the question, and the evidence are the same in both suits, not on the ground of comity alone, but with the practical and salutary object of avoiding repeated litigation and conflicting decrees in the courts of the several districts upon matters which, having been once passed upon by a court of first instance, ought to be referred to a court of appeal for authoritative determination."

It will be seen that patent cases have called out the strongest judicial expressions in favor of uniformity of decision, but in other fields of federal jurisdiction a like policy has been adhered to. A decision in admiralty has already been quoted. In receivership matters involving operations in different states the impropriety of conflicting interpretations of the scope of the receivership has been recognized, and in customs cases uniformity in applying the terms of the Tariff Acts has usually prevailed.

If we could leave the subject of federal comity here, with only the judicial utterances quoted to elucidate the topic, there would be nothing of what Dicey had in mind when he defined comity as caprice; but we must turn to another line of thought upon the subject where caprice is sufficiently manifest. Indeed, Judge Dallas might well claim for uniformity of decision in patent causes a higher sanction than that of comity, for an examination of the whole field of decision reveals comity as rather an uncertain reliance. Comity alone as a controlling principle seems to give too much play to some very human weaknesses, — weaknesses which judges share with the rest of mankind. Too many judges, of strong individuality, are unequal to the self-effacement required to make comity a wholly effective principle of federal jurisprudence. Some of them, if not avowedly, yet in practical effect, seem to approach the decisions of courts of no higher commission than their own from the standpoint of the Irish judge who said that "when a decision of one court is cited to another of coördinate authority, the latter has a right to regard it in a critical or even sceptical spirit." [15] When parties before the court are assiduously

[15] *In re* Tottenham's Estate, Ir. 3 Eq. 528 (1869). There are expressions about comity in English decisions, and in the courts of the Empire outside of England, that show much the same tendencies and impulses that we find in our federal courts. The old courts of Westminster Hall, the Common Pleas, King's Bench, and Exchequer

urging it to exercise its independent judgment, this sceptical spirit is easily yielded to; and though the cases in which it has prevailed over other considerations are neither so numerous nor so persuasive as those in which the advantages of a uniform administration of the law have been kept steadily before the eye of the court, they are sufficient in number to make the question of the mutual relations of the coördinate federal courts one of some uncertainty.

For example, we find Judge Knowles, in the District of Montana,[16] when it was urged upon him that if one circuit court decides a point all the others should conform, saying flatly that "this is not the rule which prevails in the circuit courts of the United States," and he fortifies this with the Bible. "In the Bible," he says, "there is the command: 'Thou shalt not follow a multitude to do evil.'"

Judge Knowles was not sitting in a patent case when he expressed himself in that manner; but even in patent cases, where there is such general agreement the other way, like views have been enunciated. Thus, in the Western District of Missouri,[17] Judge Phillips says of a decision in another district on the patent then before him:

"The only consideration to which that decision is entitled, aside from the recognized ability of the judge, rests upon the comity between courts. The broadest application that can possibly be claimed for this principle is that the decision of courts of coördinate jurisdiction upon the same subject-matter of controversy is entitled to high respect as a precedent, when the subsequent case presents substantially the same state of facts. The former case is not conclusive. After giving due weight to all prior adjudications, the question of infringement of a patent is still to be determined in each particular case as it arises on the evidence adduced."

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followed each other's decisions as a matter of comity among judges, but the vice-chancellors have often shown considerable independence of each other. (See The Vera Cruz, 9 P. D. 96 (1884); Gathercole *v.* Smith, 44 L. T. 439 (1881).) The Court of Appeal, by Brett, M. R., has said that "a court of law is not justified, according to the comity of our courts, in overruling the decision of another court of coördinate jurisdiction." Palmer *v.* Johnson, 13 Q. B. D. 351, 355 (1884). In a more recent case, Sir Swinfen Eady, sitting as a judge of first instance in England, held that he was bound by the unanimous judgment of the Court of Session in Scotland construing an Act of Parliament which applied to both England and Scotland. *In re* Hartland, [1911] 1 Ch. 459, 466.

[16] Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604, 613 (1891).

[17] Worswick Mfg. Co. *v.* City of Kansas, 38 Fed. 239, 241 (1889).

Likewise Judge Archbald, in the District of New Jersey,[18] made an elaborate examination of the question of the validity of a patent which had been the subject of extended litigation in the Second Circuit. He acknowledged the decisions in that litigation as of material assistance to him, but held that he was not controlled by them, nor absolved from an independent examination of the questions involved, and claimed for his conclusions, though indeed conforming to those decisions, that they were substantially his own.

And Judge Kohlsaat, in the Northern District of Illinois,[19] after stating that there was no material difference between the papers before him and those before the courts in litigation over the same patent in the Second Circuit, said:

"Complainant seeks to have this court follow the decisions of the courts of the Second Circuit upon the questions of validity and infringement, in accordance with a rule of comity which is said to prevail in some circuits; but the utterances of the Court of Appeals of this circuit have been positive to the effect that each case in this circuit must be decided upon its merits as disclosed by the record therein, and that a ruling or opinion of any other Circuit Court or Court of Appeals upon any question involved should be given only its just and reasonable weight according to the circumstances; and it therefore follows that this court should give weight to the said decisions in the Second Circuit only to the extent that the reasoning therein, as applied to the facts presented by this record, may be persuasive."

The learned judge does not cite the positive utterances of the Court of Appeals for his circuit (the seventh) which guided him in this decision. But it remains for us to consider the attitude of the several Circuit Courts of Appeals towards this matter of comity.

The Circuit Court of Appeals Act of 1891 made an important modification of the federal judicial system. It introduced a new tribunal into each of the nine circuits into which the judicial districts of the country were already grouped,—an appellate tribunal to take over a substantial portion of the jurisdiction of the United States Supreme Court. Much of the jurisdiction of this new court, including patent litigation, was made final, though to the Supreme Court was left a power of intervention by certiorari. It should be

[18] Cimiotti Unhairing Co. *v.* American Fur Refining Co., 120 Fed. 672, 674 (1903).

[19] Welsbach Light Co. *v.* Cosmopolitan, etc. Co., 100 Fed. 648, 649 (1900).

remembered, however, that certiorari from the Supreme Court is always a matter of grace and not of right, and that it is a remedy very sparingly granted.

The entry of nine Circuit Courts of Appeals into the field of federal judicial action has made the question of comity among the federal courts one of increased seriousness. It has, to be sure, reduced the opportunities for confusion by bringing some eighty odd districts, each clothed with powers of independent action, into nine family groups under a local appellate tribunal; and the effect of this is inevitably to produce a degree of cohesion within each group that practically prevents discordant rulings. But, on the other hand, a lack of uniformity of action among nine appellate courts, vested with a large measure of finality of decision, is a more serious matter than diversity among courts of first instance. With the country, as it were, divided for federal judicial purposes into nine independent principalities, the views of the nine appellate courts of their proper attitude towards each other, — in other words, their views of comity, — take on increased importance.

When we investigate those views we find the same tendencies at work that had been apparent in the lower courts. Some of the Courts of Appeals have seen themselves clearly as parts of a whole, and have recognized the necessity of subordination to the integrity of the system of which they were a part, while others have regarded themselves as clothed with an independent jurisdiction which it would be stultifying to minimize in any degree. The best expression of the first point of view is found in the opinion of Judge Putnam in *Beach* v. *Hobbs*.[20] This opinion was delivered, indeed, in the Circuit Court, but the Court of Appeals adopted his views when the same case came before it on appeal.[21] Judge Putnam handled the subject with a firm grasp, and he must be quoted at some length:

"It is necessary, first of all, that we should determine the effect to be given to the legal proceedings in the Second Circuit. . . . So far as any proposition may be fully presented to the Court of Appeals in any circuit, and determined by it, resulting in a rule which is, and ought to be, of general application, especially when it involves federal questions, a condition of adjudications which would defeat uniformity throughout the United States would clearly disappoint the contemplation of Congress

[20] 82 Fed. 916, 918, 919 (1897). [21] Hobbs v. Beach, 92 Fed. 146, 147 (1899).

in establishing those tribunals. It certainly was not the expectancy of Congress that the establishment of those courts would destroy the general uniformity of adjudications in the federal tribunals touching general principles of law, and especially touching federal questions, which has heretofore existed; nor was it its purpose to create several centres for the determination of that class of questions, which would take on a local character, as is the fact with reference to the various state tribunals. As was said by the Circuit Court of Appeals for this circuit in *Beal* v. *City of Somerville*, 1 C. C. A. 598, 50 Fed. 647, 652, the Circuit Courts of Appeals must maintain themselves as tribunals of final jurisdiction, notwithstanding the possibility that cases disposed of by them may in some form reach the Supreme Court. In view of this fact, a decision of the Circuit Court of Appeals in any circuit, so long as it remains unappealed from, and so long as the Supreme Court has not issued its writ of certiorari to reëxamine it, must be regarded as having more effect than that ordinarily given to even the highest state tribunals, or to any court of merely concurrent jurisdiction, no matter how great its learning. There seems to be no method of maintaining the necessary uniformity of the law with reference to general questions, especially federal questions, unless the mature and solemn judgments of a Circuit Court of Appeals in any circuit are accepted as authoritative declarations of the law, subject only to such criticisms on the score of oversight or evident mistake as would apply to a judgment of the Circuit Court of Appeals in the particular circuit where the litigation then under determination may be pending."

The learned judge then adds as to patent litigation:

"These considerations have a special importance as applied to a solemn and well-considered judgment of any Circuit Court of Appeals with reference to a patent for an invention issued by the United States, when the state of the proofs remains substantially the same, in view of the reluctance of the Supreme Court to issue writs of certiorari in causes of this character involving mainly questions of fact; otherwise such patents, although intended by statute to have effect throughout the whole country, would, for practical purposes, be territorially limited, and would be of effect only in portions thereof, and practically invalid in other portions."

The adoption of Judge Putnam's views on this matter by the Circuit Court of Appeals for the First Circuit settled the attitude of that court, an attitude which it has ever since carefully adhered to.

In the Second Circuit the Circuit Court of Appeals has tended towards the position taken in the First Circuit; but it has not committed itself squarely to it. In *Norwich, etc. Society* v. *Stanton* [22] it followed a decision of the Circuit Court of Appeals in the Ninth Circuit, saying that it was "very far from being clear" that that decision was erroneous. In *Erie R. Co.* v. *Russell*,[23] an action involving the federal Safety-Appliance Act, it followed a decision of the Circuit Court of Appeals in the Eighth Circuit "in view of the desirability of uniformity in the decisions of the courts of the different circuits in interpreting this act," and its action is made the more impressive by the intimation in the opinion that a majority of the court would have reached a different conclusion in the absence of that Eighth Circuit authority.

In the Third Circuit the Circuit Court of Appeals has refrained from running counter to decisions in other circuits, but it does not seem to have established for itself any general rule. In some of its cases it has expressed a very strict policy. Thus in *Aspinwall's Estate*,[24] upon a question of its own jurisdiction, the court said:

"This question was before the Circuit Court of Appeals for the First Circuit in *Re Coe*, 1 C. C. A. 326, 49 Fed. 481; and it was there held that the disallowance of an appeal from an order remanding a cause to the state court in which it had originated was proper. It has been urged in argument that the reasons given for the judgment in that case are unsound; but that contention is, in our view of the matter, irrelevant. We believe it to be our duty to follow that judgment, not for the reasons assigned in its support, which it is not necessary either to adopt or to reject, but because uniformity of decision amongst the several Courts of Appeals upon such a jurisdictional question seems to us to be of paramount importance. It will not result from acceptance of this view of the subject that an error once committed would be indefinitely perpetuated, for the Supreme Court may at any time settle such questions for all the Courts of Appeals alike."

And in *McCoach* v. *Philadelphia, etc. Co.*,[25] where the court had before it a suit on an internal revenue statute, in which the court below had followed a decision of the Circuit Court of Appeals for the Second Circuit, it said:

[22] 191 Fed. 813 (1911).
[23] 183 Fed. 722, 725 (1910).
[24] 90 Fed. 675, 676 (1898).
[25] 142 Fed. 120, 121 (1905).

"We think, not only that the court below was clearly right in following the decision of the Court of Appeals for the Second Circuit, but that this court, also, should follow it. We base this ruling, not upon comity merely, but upon the ground that in suits of this character uniformity in the judgments of the several Courts of Appeals is especially important, and should be maintained wherever, as in the present instance, there has been no decision of the Supreme Court which precludes it."

In *Hill* v. *Francklyn & Ferguson*[26] the same court, in a suit relating to duties under the tariff act, even followed the decision, not appealed from, of a court of first instance in the Second Circuit, saying:

"In suits of this character, uniformity in the judgments of the courts of first instance, as well as in those of the appellate tribunals, is desirable, and where no direct attack has been made upon a prior adjudication by a Circuit Court of the question sought to be subsequently raised in a similar suit we think that the prior adjudication, unless clearly erroneous, should be followed."

But in a later case, *F. B. Vandergrift & Co.* v. *United States*,[27] the court again had before it a question under the Tariff Act which had been decided below on the strength of a Circuit Court decision in the Second Circuit, and here its language seems to throw comity back into uncertainty, although it is not of comity between Circuit Courts of Appeals that the opinion speaks:

"Did the learned judge err in adopting the decision of the Circuit Court for the Southern District of New York? . . . The learned judge was clearly right in saying that it is desirable that different decisions should not be made as to the rate of duty upon the same articles in the different districts. There rests undoubtedly upon a court the duty of determining by its own investigation whether or not the article should bear a certain duty. This is saying no more than that each court will decide the question for itself, unless the appellate court has determined the question for it; but that it has been decided in a certain way in one jurisdiction should have weight, because of the desirability of having uniformity of decision upon the same question, and the decision itself has a certain persuasive value, determined by the strength and logic of its statement, and this is especially true of the case at bar. While, therefore, we would not feel ourselves bound by a decision of a court of another jurisdiction upon the same question, we are satisfied in this case

[26] 162 Fed. 880, 881 (1908). [27] 173 Fed. 609, 611 (1909).

that the learned judge made no error in following the decision in the Eckstein case."

Of the remaining circuits, only in the Seventh has there been any reference by a Circuit Court of Appeals to this topic, and the reference there is of the briefest character. In *Heckendorn* v. *United States*[28] that court said:

"The questions propounded by appellant have been decided adversely to his contentions by the Circuit Court for the Northern District of New York and by the Court of Appeals for the Second Circuit. . . . But appellant is right in claiming that he is entitled to our independent consideration and judgment."

This declaration of independence gains emphasis from the circumstance of its utterance in a case under the Tariff Act, where the confusion which would be produced in the collection of customs duties by diversity of rulings in different parts of the country is so obvious; but in practical result it did not make for immediate confusion, since the court's independent consideration of the question led it to the same result as that reached in the Second Circuit.

Indeed, it is to be noted that, although there has been this diversity in some of the utterances of the Circuit Courts of Appeals, there has been no diversity of action. The independent and uncontrolled judgment which in a few instances has been asserted has led to no conflict of decision. On the whole, probably none is to be apprehended. The system of federal Courts of Appeals is still young. It may be trusted, as time goes on, to work out a policy of harmonious action among the coördinate jurisdictions. The judges of a system of national courts must increasingly feel the constraint, not of an international comity of caprice, which is no constraint at all, but of a national comity of order and consistency, dictated by sound principles of public policy. In yielding to such constraint the courts are not belittling themselves; rather do they gain in dignity thereby. The national courts, administering the national law, constitute a system which must be at unity with itself.

Arthur March Brown.

BOSTON, MASS.

[28] 162 Fed. 141, 142 (1908).